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therefore jurisdiction over the suit and rightly entertained it when it was instituted. The fact that a portion of the claim was withdrawn could not, in the absence of fraud, oust a Court of its jurisdiction. If the withdrawal was the result of an intention to defeat the provisions of the law and to confer jurisdiction on a Court which would otherwise have no jurisdiction that would be a different matter. But, as in the present case there is no suggestion of fraud, the mere fact of a portion of the claim being abandoned by a compromise could not, in the absence of any statutory provision, divest the Court of the jurisdiction which was vested in it by law. I am not aware of any such provision and the learned counsel has referred us to none. For these reasons I concur in the order proposed by the learned Chief Justice.

GRIFFIN, J.—I concur with the learned Chief Justice in the order proposed by him.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the learned District Judge be set aside and the appeal be remanded to him under section 562 of the Code of Civil Procedure with directions that it be reinstated in the file of pending appeals in its original number and be disposed of on the merits, regard being had to the observations which have been made by us in our judgments. We direct that the costs of this appeal and the costs heretofore incurred do abide the event.

Appeal decreed and cause remanded.

APPELLATE CRIMINAL.

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August 10.

Before Mr. Justice Richards and Mr. Justice Karamat Husain.

EMPEROR *v.* BHAGWAN DIN AND ANOTHER. *

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 302, 304, 325, 328 *and* 329—*Administration of dhatura for the purpose of facilitating robbery—Death of person to whom dhatura is so administered—Offence not murder, but causing grievous hurt.*

Where, for the purpose of facilitating robbery, dhatura was administered by two persons to certain travellers, in consequence of which one of the travellers died and others were made seriously ill, it was *held* that in respect

* Criminal Appeal No. 350 of 1908 against an order of S. R. Daniels, Sessions Judge of Cawnpore, dated the 27th of March 1908.

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of the traveller who died the offence committed was that punishable under section 325 of the Indian Penal Code, *viz.*, grievous hurt : and in respect of the travellers who did not die the offence committed was that defined by section 328 of the Code. *Queen Empress* v. *Tulsha* (1) not followed.

THE two accused in this case, Bhagwan Din and Ram Prasad, were found to have administered dhatura to certain travellers for the purpose of facilitating the robbery of their effects. It was also found that in consequence of such administration of dhatura by the two accused one of the travellers, by name Sidhua, died. Bhagwan Din and Ram Prasad were convicted by the Joint Sessions Judge of Cawnpore each upon two charges, one under section 304 of the Indian Penal Code, and one under section 328. Bhagwan Din was sentenced to seven years' rigorous imprisonment on each charge, and Ram Prasad to four years on each charge, and they were formally acquitted of a charge under section 302 of the Indian Penal Code, which had also been framed against them. The convicts appealed against these convictions and sentences to the High Court.

The appeals first came before Knox, J., who was of opinion that section 304 did not apply, and directed notice to go to both accused to show cause why they should not be convicted under section 329 and their sentences enhanced.

The appeal and the rule then came before a Bench consisting of Aikman and Griffin, JJ., before whom it was represented by the Assistant Government Advocate that the ruling in *Queen Empress* v. *Tulsha* (1) applied to the case and that the Sessions Judge was wrong in acquitting the accused of the charge under section 302. The case was then adjourned in order that the attention of Government might be drawn to the case with a view to an appeal being filed against the acquittal of the accused under section 302. The case was accordingly brought to the notice of Government, and eventually an appeal under section 417 of the Code of Criminal Procedure was filed. This appeal, together with the appeals of the convicts and the rule issued by Knox, J., was then put up for hearing before a Bench consisting of Richards and Karamat Husain, JJ. As to the appeal on behalf of the Local Government it was urged that the case was governed by the ruling above referred to and that a conviction ought

(1) (1897) I. L. R., 20 All., 143.

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to have been recorded under section 302 of the Indian Penal Code.

The Government Advocate (Mr. *W. Wallach*), for the Crown.

The accused were not represented.

RICHARDS and KARAMAT HUSAIN, JJ.—In this case Ram Prasad and Bhagwan Din have both been convicted under sections 328 and 304, Indian Penal Code. Bhagwan Din has been sentenced to seven years' rigorous imprisonment under each section to run consecutively. Ram Prasad has been sentenced to four years under each section to run concurrently. Both Ram Prasad and Bhagwan Din have appealed. When the appeal came before Mr. Justice Knox he ordered that notice should go to the accused to show cause why they should not be convicted under section 329 of the Indian Penal Code and the sentences enhanced. The learned Judge was of opinion that the case did not fall under section 304, Indian Penal Code. After the case had come up before a Bench of two Judges an appeal was instituted on behalf of the Government against the acquittal of the accused under section 302, Indian Penal Code. The evidence has been most carefully dealt with in the judgment of the learned Sessions Judge, and we have not the smallest doubt about the facts of the case, which are shortly as follows:—Bhagwan Din in the guise of a sadhu and Ram Prasad, a youth with him, administered dhatura poison to some four travellers whom they met on the road between Cawnpore and Allahabad, the motive being unquestionably to rob these persons. Sidhua, one of the persons poisoned, died as the result of the poisoning There was a small boy with the two accused of the name of Mahadeo, and he was, as we think, very properly acquitted. We agree with our learned brother that the case does not fall under section 304. If the accused administered the dhatura with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that they were likely by administering the dhatura to cause death, they would be guilty of culpable homicide and their act would not have come within any of the exceptions mentioned in section 300. We, however, think that the accused cannot be convicted under

section 329. That section provides that whoever voluntarily causes grievous hurt for the purpose of extorting, etc. Extortion is defined in section 383, Indian Penal Code, and although we think that grievous hurt was caused to Sidhua, it was not for the purpose of "extortion" within the meaning of section 329. Possibly the case might have come under section 326, Indian Penal Code, but that is not the section under which notice went to the appellants.

With regard to the appeal of the Government, we do not feel absolutely convinced that the accused or either of them had any intention to cause bodily injury likely to cause death, or knowledge that their act was likely to cause death. Dhatura is not exactly a deadly poison, and may often be given for the purpose of merely stupifying a victim. We think, however, that the offence so far as Bhagwan Din is concerned was a very serious one and deserves serious punishment.

Ram Prasad is about 14 years of age and may be considered to have been under the influence of Bhagwan Din. We dismiss the appeal of the Government. We alter the conviction of Bhagwan Din from a conviction under section 304 to a conviction under section 325, but maintain the sentence of seven years' rigorous imprisonment. We set aside the conviction and sentence of Ram Prasad under section 304 and acquit him of the charge under that section.

The appeal of Bhagwan Din under section 328 is dismissed. The two sentences of seven years each imposed upon Bhagwan Din will run consecutively. The conviction and sentence on Ram Prasad under section 328 will also remain in full force, and his appeal against his conviction under this section is dismissed. The rule issued to the two appellants is discharged.